United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

ORIGINAL

75-7179

To be argued by
IRVING B. BUSHLOW

United States Court of Appeals

FOR THE SECOND CIRCUIT

CHARLES SCALAFANI,

Plaintiff-Appellee,

against

MOORE-McCORMACK LINES, INC.,

Defendant and Third-Party Plaintiff-Appellant-Appellee,

against

UNIVERSAL TERMINAL & STEVEDORING CORP.,

Third-Party Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF ON BEHALF OF PLAINTIFF-APPELLEE

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Cases Cited

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Statement

This brief is submitted by plaintiff-appellee in opposition to the brief of Moore-McCormack Lines, Inc. (hereinafter referred to as the shipowner) and in support of

that part of the memorandum decision of Judge Mark A. Costantino, filed on February 10, 1975 (199a) which awarded plaintiff judgment against the shipowner. The decision is also reported at 388 F. Supp. 897 (E. D. N. Y. 1975).

Statement of Facts

Plaintiff seeks to recover damages for personal injuries sustained on January 2, 1971 at about 2 P.M. The S.S. Mormacdrago, a vessel owned and operated by the shipowner was moored to the 23rd Street Pier, Brooklyn on January 1st and 2nd, 1971 (41a, 44-45a, 93a).

It snowed heavily on January 1, 1971 from 0800 to 1600 (93a), and at 1300 that day a shore gang came aboard the vessel to clean the ship, the gangway and the deck area of snow (94a, Exhibit J). The Night Relief Officer, Gerald Gordon examined the gangway before 1600 on January 1, 1971 and found it clear of snow (94a-95a). It was still snowing moderately at 1600 on January 1, 1971 (96a).

On January 2, 1971, Gordon worked aboard the vessel from 0800 to 1600 (103a) and was on deck the entire time they were working cargo (99-100a). To the best of his recollection, there might have beeen "one piece of ice, a lot of snow" on the gangway at 0800 on January 2, 1971 (101a).

Plaintiff was employed by Universal Terminal and Stevedoring Corp. (the stevedore) as a dockman on January 2, 1971 (41a, 54a) and commenced work on that date at 0800 on the stringpiece alongside No. 4 hatch (42a-44a). Three gangs of longshoremen went aboard the vessel to work at 0800 (99a, Exhibit K). However, plaintiff did not go aboard the vessel from 0800 to 1400 (2 P.M.) (43a-44a).

At 1400 on January 2, 1971, plaintiff started to go aboard the vessel by way of the gangway to take a coffee order for his gang (44a, 46-47a). He saw snow, ice and sawdust on each step of the gangway (51a), and he held onto the gangway railing with both hands (58a) as he walked up the steps. Upon reaching the top of the gangway, plaintiff saw snow, ice and sawdust on the platform (51a). Only one-half of the platform had hand railings (50a) and there were no hand railings where plaintiff fell (60a, 62a, 127a, 183a).

As he crossed the platform, plaintiff's left foot slipped on snow or ice (150a) and he fell forward landing on his right knee, twisting his right ankle (50a, 130a).

Plaintiff's accident was witnessed by Anthony Misseri, a fellow longshoreman, who saw snow, ice and sawdust on the gangway platform with a skidmark in it (148a-150a). The snow, ice, sawdust and skidmark was also seen by another longshoreman, Bianco Bianchi (180a, 183a).

Patrick O'Connor, a Superintendent for the stevedore saw plaintiff sitting on the deck on January 2, 1971 and was told by the plaintiff that he had slipped and fallen. He testified that the gangway might have had patches of snow and sawdust on them at that time (137, trial transcript).

POINT I

The Court's findings were not clearly erroneous.

There was uncontradicted proof that there was a snowfall on January 1, 1971 which lasted throughout the day from 8:00 A.M. until past 4:00 P.M. and that at 1:00 P.M.

on January 1, 1971 a cleaning gang came aboard the vessel to clean snow off the deck walking areas and gangway. After the cleaning gang had left the vessel, and when Gordon was leaving the vessel at 4 P.M., it was still snowing.

Plaintiff's proof was also uncontradicted that at 2:00 P.M. on January 2, 1971, the platform on the top of the ship's gangway had patches of ice and snow on it and that there was sawdust on the ice and snow. The shipowner's Night Relief Officer Gordon inspected the area of the gangway throughout the hours from 8:00 A.M. to 4:00 P.M. on January 2, 1971. He could not be sure whether there was ice or snow on the platform of the gangway.

It seems clear from the testimony that the owner had a shore gang clear away the snow before it stopped snowing and that on January 2, 1971 there was still some patches of ice and snow on the platform of the gangway and that plaintiff slipped in some of this ice or snow. There was no proof of any cleaning on January 2, 1971. The shipowner had actual, or at least, constructive notice of the ice and snow and had apparently tried to make it safe by putting sawdust on the platform. This did not accomplish its purpose and plaintiff slipped and fell because of the conditions and because the hand railings next to the platform were not rigged to cover the entire distance.

As a result of the foregoing, it seems clear that plaintiff proved the negligence of the shipowner and the unseaworthiness of the vessel and the Court's findings to that effect were supported by the evidence and were not clearly erroneous. *McAllister* v. *United States,* 348 U.S. 19.

POINT II

The shipowner was negligent.

A shipowner is under a duty to exercise reasonable care for the safety of longshoremen working aboard its vessel and to provide the longshoremen with safe equipment and appliances and a safe place in which to work. *Mahnich* v. *Southern SS Co.*, 321 U.S. 96 (1944). A shipowner is liable for the negligent acts of its officers, agents, servants or employees performed during the course of their employment aboard the vessel. *Mitchell* v. *Trawler Racer, Inc.*, 362 U.S. 539 (1960).

In this case the shipowner had a duty to discover the icy condition and to take steps to correct it by sanding it or putting down sawdust. *Vareltzis* v. *Luckenback Steamship Company*, 258 F2d 78, 80 (2 Cir. 1958); *Chesapeake & Ohio Railway Company* v. *Newman*, 243 F2d 804, 808, 809 (6 Cir. 1957). Having assumed the duty by putting down sawdust, defendant had a further duty to make certain that the job was done properly so as to eliminate slippery and icy spots especially when workers were using the area and tracking snow on to the platform. *Mercardo* v. *United States*, 184 F2d 24, 29-30 (2 Cir. 1950).

The fact that the Night Relief Officer Gordon periodically viewed the platform during his working hours and in his opinion, thought it to be safe, does not control here, since the fact that plaintiff did slip and fall in an area where there was no hand railings indicates that the platform was unsafe.

The lack of the handrails is an independent ground for a finding of negligence against the shipowner since the Night Relief Officer in his inspections, should have noticed their absence and corrected the situation.

Thus, the breach of the shipowner's duty to provide the longshoremen with a safe place to work gives rise to a cause of action based on negligence. Moreover, liability may be imposed upon a shipowner whenever the negligence of the shipowner or crew member "played any part *even the slightest* in producing the injury . . . for which damages are sought." (emphasis supplied). *Ferguson* v. *Moore-McCormack Lines,* 352 U.S. 521; *Rogers* v. *Missouri Pacific Railway,* 352 U.S. 500 (1957).

POINT III

The vessel was unseaworthy.

The failure of the vessel to have the snow and ice removed or properly sanded rendered the vessel unseaworthy, since the duty of furnishing a seaworthy vessel, equipment and appliances is absolute and non-delegable. *Seas Shipping Co.* v. *Sieracki,* 328 U.S. 85 and is not dependent upon negligence as it is a species of liability without fault. *Le Gate* v. *Panamolga,* 221 F2d 689.

The shipowner is under a continuing duty to furnish a vessel which is seaworthy in all respects and safe to work aboard. *The H.S. Scandrett,* 87 F2d 708, 711; *Mahnich* v. *Southern S.S. Co.,* supra; *Seas Shipping Co.* v. *Sieracki,* supra.

Plaintiff need only show that a vessel is unseaworthy in a particular respect and that the particular unseaworthy condition or conditions was a proximate cause of his injury. *McAllister* v. *Magnolia Petroleum Company,* 357 U.S. 221. In *Vastano* v. *Partownership Brovigtank,* 158 F.Supp. 477, 479 (E.D.N.Y. 1957) the Court held a shipowner liable for a longshoreman's injury when he slipped and fell on ice on the deck of the vessel, which ice was concealed by falling snow and no effort had been

made to clean it up. The court found both negligence and unseaworthiness. This was essentially the same reasoning applied in *Haughton* v. *Blackships, Inc.*, 462 F2d 788, 789 (5 Cir. 1972), where a seaman slipped and fell on uncleared snow and the Court found an unseaworthy vessel.

Under the facts here, it can hardly be argued that the vessel was seaworthy. Plaintiff had to use the gangway to come aboard the vessel and had to cross the platform at the top of the gangway. Although he saw the ice, snow and sawdust, he tried to walk on it carefully, but in the absence of handrails, had nothing to hold onto when he slipped. The absence of handrails by itself is sufficient grounds to find the vessel unseaworthy.

The shipowner argues in its brief that a gangway containing ice and snow over which men have to walk is an area reasonably fit for its intended purpose. To support its contention, it cites *Rice* v. *Atlantic & Pacific Co.*, 484 F2d 1318 (2 Cir. 1973) which involved the presence of oil on the step of a stairway in an engineroom, which is exactly where you would expect to find it. Obviously, plaintiff could not expect ice to be present on the gangway and the gangway was not fit for its intended purpose when there was ice and snow on a walking surface. The fact that plaintiff slipped on the ice and snow and fell is sufficient proof to show that the gangway was not fit for its intended purpose.

POINT IV

Plaintiff was not contributory negligent.

Because of the fact that plaintiff was using the gangway to go to a place in which he was ordered to work, and such place was unsafe, he cannot be guilty of contributory negligence *In Re Luchenback,* 16 F2d 168 (SDNY 1925), 16 F2d 171 (2 Cir. 1926); *Salem* v. *U.S. Lines Co.,* 293 F2d 121 (2 Cir. 1961) reversed for plaintiff on other grounds, 370 U.S. 31 (1962). In this case what the shipowner is claiming is contributory negligence is in fact assumption of risk, and the Supreme Court has long ago ruled that assumption of risk is not a defense in this type of action, the *Arizona* v. *Arelich,* 298 U.S. 110, since, the plaintiff does not assume the risk of an unsafe place to work nor working with unseaworthy equipment even if it is known to be unsafe by him. *Palermo* v. *Luchenback,* 355 U.S. 20.

CONCLUSION

The findings of the Court below are not clearly erroneous and the judgment should be affirmed.

Respectfully submitted,

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375—Affidavit of Service United States Court of Appeals
For the Second Circuit

The Reporter Co., Inc., 11 Park Place, New York, N. Y. 10007

Charles Scalani

Plaintiff-Appellee

against

Moore McCormack Lines Inc.,

Defendant and Third Party Plaintiff-Appellant
Appellee

against

Universal Terminal & Stevedoring Corp.

Third Party Defendant-Appellant

AFFIDAVIT OF SERVICE

STATE OF NEW YORK,
COUNTY OF New York , ss:
Raymond J. Braddick, agent for Irving B. Bushlow Esq. being duly sworn,

deposes and says that he is over the age of 21 years and resides at
8 Mill Lane Levittown, New York
That on the 24th. day of November 19 75 at
576 5th. Avenue New York, New York
he served the annexed Brief upon
Dougherty Ryan Mahoney & Pellegrino & Griffin Esqs.
in this action, by delivering to and leaving with said attorneys
2 true copys thereof.

DEPONENT FURTHER SAYS, that he knew the person so served as aforesaid to be the person mentioned and described in the said action

Deponent is not a party to the action.

Sworn to before me, this 24th.
day of November 19 75

Raymond J. Braddick

Roland W. Johnson
ROLAND W. JOHNSON
Notary Public, State of New York
No. 4509705
Qualified in Delaware County
Commission Expires March 30, 19

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the within Brief is
hereby admitted this 24th day
of November, 1975

McHugh Heckman, Smith & Gerard
Attorney for Third-Party Def-Appellant

Services of Two (2) copies of
the within is
hereby admitted this day
of , 197

Attorney for